

**BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

Meeting Date: March 15, 2006
Bulk Item: Yes ☐ No ☒

Division: County Attorney
Department: County Attorney
Staff Contact Person: Bob Shillinger x3470

AGENDA ITEM WORDING: Presentation of settlement offer in *Helen & Gregor Emmert v. Monroe County*, CA P 02-520.

ITEM BACKGROUND: The Emmerts filed suit in 2002 seeking damages for a regulatory taking they alleged resulted from application of the County's wetland regulations to their vacant property in Ocean Reef. The Emmerts subsequently amended their complaint with a count seeking to have the court enjoin the County from applying any land development regulations enacted after September 15, 1986, to the subject property, based on their allegation of vested rights. The court granted the County's motion for partial summary judgment and dismissed that count. More recently, the Emmerts amended their complaint to include declaratory judgment claims seeking to have the Court declare what, if any, vested rights they have to develop the subject property without regard to the County's wetland regulations. The Emmerts argue that the County used incorrect maps in determining the wetlands that exist on their property. The Emmerts propose dropping their suit and their claim for attorney's fees and costs if the County agrees to issue the permit that they have requested.

Derek Howard, the County's counsel contends that the Emmerts cannot sustain any of their claims for a number of reasons including statute of limitations, collateral estoppel, and insufficient evidence. Counsel advises that the Emmerts could obtain a permit to build a house within a footprint of 2,600 square feet tomorrow. The Emmerts, however, seek to build within a larger footprint. Counsel further advises that the case is postured for a County victory after the next round of motions hearings.

To date, the County has expended approximately \$95,000 in attorney's fees in defending this action.

PREVIOUS RELEVANT BOCC ACTION: On August 21, 2002, the Board adopted resolution 348-2002 which approved a Beneficial Use Determination order which authorized a modification of the wetland regulations to permit use of additional square footage for the proposed house.

CONTRACT/AGREEMENT CHANGES: N/A

STAFF RECOMMENDATIONS: Litigation counsel opposes settling for the proposed terms.

TOTAL COST: <u>n/a</u>	BUDGETED: Yes <input type="checkbox"/> No <input type="checkbox"/>
COST TO COUNTY: <u>n/a</u>	SOURCE OF FUNDS: <u>n/a</u>
REVENUE PRODUCING: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	AMOUNT PER MONTH: <u>n/a</u> Year: <u>n/a</u>

APPROVED BY: County Atty ☒ OMB/Purchasing ☐ Risk Management ☐

DIVISION DIRECTOR APPROVAL: 
Suzanne A. Hutton, Interim County Attorney

DOCUMENTATION: Included ☒ Not Required ☐

DISPOSITION: _____ **AGENDA ITEM #** _____

RESOLUTION NO. 348 -2002

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, EVIDENCING THE BOARD'S APPROVAL OF A RECOMMENDED BENEFICIAL USE DETERMINATION PROMULGATED BY THE SPECIAL MASTER, IN RE: THE APPLICATION OF HELEN H. EMMERT

WHEREAS, on January 4, 1996, the Monroe County Year 2010 Comprehensive Plan became effective; and

WHEREAS, the application of HELEN EMMERT for determination of beneficial use was heard by Special Master John J. Wolfe on November 8, 2001; now therefore

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, that:

The Findings of Fact, Conclusions of Law and recommendations of the Special Master as set forth in the Proposed Partial Grant of Beneficial Use on the application of HELEN EMMERT, are hereby APPROVED, subject to the conditions listed in the attached Proposed Beneficial Use Determination, dated May 23, 2002.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of the Board held on the 21st day of August, 2002.

Mayor McCoy
Mayor Pro Tem Spehar
Commissioner Nelson
Commissioner Neugent
Commissioner Jimenez

yes
yes
yes
yes
yes



Attest: DANNY L. KOLHAGE, Clerk

By Jamela Stanwick
Deputy Clerk

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By [Signature]
Mayor/Chairperson

jdresbu

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY
BY [Signature]
ROBERT N. WOLFE
DATE 7-17-02

FILED FOR RECORD
2002 SEP -5 PM 3:32
DANNY L. KOLHAGE
CLK. CIR. CT.
MONROE COUNTY, FLA.

**BENEFICIAL USE
MONROE COUNTY SPECIAL MASTER**

In Re: Helen H. Emmert
Beneficial Use Application

**PROPOSED
PARTIAL GRANT OF BENEFICIAL USE**

The application for a beneficial use determination was considered at a duly noticed hearing on November 8, 2001, before John J. Wolfe, designated Beneficial Use Special Master for Monroe County. Andrew M. Tobin represented the Applicant. Karen K. Cabanas represented Monroe County. Having reviewed and heard all evidence presented, testimony of witnesses and arguments of counsel, the undersigned Hearing Officer makes the findings of fact and conclusions of law and proposes the determination as set forth below.

ISSUE

Whether the Applicants have been denied all reasonable economic use of their property by application of Policies 204.2.1 and 203.1.3 of the Year 2010 Comprehensive Plan (the "Plan"), and whether the Applicants are entitled to relief under Policy 101.18.5 of the Plan and Section 9.5-173 of the Monroe County Code (the "Code").

Whether the additional effect of the Ocean Reef deed restrictions and building regulations are to be considered which, in combination with applicable provisions of the Plan and Code, make the subject property unbuildable.

FINDINGS OF FACT

1. The subject property is located at Harbor Course, Section Four, Ocean Reef, Plat No. 13, Lot 26, Block 3, RE#0573670-002600 (the "Lot"), and is within an Improved Subdivision (IS) land use district with a future land use designation of Residential Medium (RM). The Lot is an approximately 24,000 square foot wedge-shaped parcel and has existing homes on each side.

2. In 1988, the Ocean Reef Club on behalf of its members applied for a positive determination of vested rights to complete the remaining development contemplated by the 1977 Master Plan of the Ocean Reef Club.

3. The Ocean Reef Master Development Plan was formally vested under Resolutions 539-1988 and 478-1988. The Monroe County Board of County Commissioners determined that the 1977 Master Plan should be vested "by use and density categories in existence, prior to September 15, 1986." This vesting did not exempt Ocean Reef properties from regulations promulgated to protect environmental resources.

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4. Applicant purchased the Lot in 1983, believing the Lot was buildable. At the time of purchase, there were no regulations that would have prevented Applicant from filling the Lot or from constructing the home depicted on the site plan introduced by Applicant at the hearing, and previously submitted to the Planning Department.

5. On March 23, 1999, County Biologist Jeanette Hobbs prepared a Letter of Current Site Conditions which described a majority of the Lot as saltmarsh and buttonwood wetlands. Policy 204.2.1 of the Plan, adopted January 4, 1996, requires a 100% open space ratio for undisturbed saltmarsh and buttonwood wetlands. Attached to her letter was a sketch showing the buildable area of the property partly within the hammock area located near the front of the Lot.

6. The 100% open space requirement results from the wetlands on the Lot being considered "red flag" wetlands. The wetlands have been characterized as "undisturbed", though the testimony demonstrates that they are isolated wetlands in that an area of fill exists between such wetlands and the dredged canal known as Dispatch Creek located at the rear of the Lot. The County permits development with mitigation in wetlands areas other than "red flag" wetlands. The Florida Department of Environmental Protection and the U.S. Army Corps of Engineers would typically allow some development in these wetlands with appropriate mitigation.

7. Pursuant to the Applicant's request, on November 14, 1999, a pre-application letter of understanding was prepared by County Planning Director Marlene Conaway which concluded that due to the inability to fill "red-flag" wetlands under the Code and the setback requirements, only "an odd shaped, small upland area within the hammocks habitat at the eastern edge of the property is available for development. This irregular area consists of approximately 1,800 square feet." The site plan introduced by Applicant at the hearing was rejected because 2/3 of the site plan was in the saltmarsh and buttonwood area.

8. On July 19, 2001, Mr. Tobin, on behalf of applicant, submitted a wetland mitigation proposal prepared by Robert Smith, which proposed filling a portion of the wetlands on the Lot "in exchange for creating a functional mangrove wetland habitat on the filled and disturbed area adjacent to the canal on a 2:1 basis" (the Mitigation Proposal). The Mitigation Proposal was submitted at the hearing, but continued to be unacceptable to the County based on the prohibition against filling "red-flag" wetlands and other reasons testified to by Jeanette Hobbs.

9. The Lot is subject to the following private deed restrictions and building regulations which are administered by the Ocean Reef Homeowners Association and its Architectural Review Committee, to wit: a) the minimum size of the first floor must be 1,400, square feet, exclusive of porches, planters, garages, and patios; b) a minimum roof overhang of 2 feet is required; c) no porches or patios along a side of a structure that abuts an adjoining residence or lot; d) a front setback of 28 feet; e) a front setback above 12 feet must have a 12:12 setback slope; f) a side setback of 18 feet; g) a side setback above first 12 feet must have a 12:12 setback slope. No fences or obstructions are permitted in the building setback areas.

10. Under Monroe County's Land Development Regulations ("LDRs") and the Plan, the Lot has a buildable area of approximately 1,800 square feet.

11. Monroe County, through this process and pursuant to Section 9.5-173(a)(2) of the Code, has agreed to partially grant the Applicant Beneficial Use in order to expand the buildable area of the Lot to approximately 2,300 - 2,500 square feet ("The Revised Buildable Area"), by allowing the following:

1. With specific stormwater management measures, as set forth in the 8/21/2000 letter from Tim McGarry and pursuant to Policy 203.1.3 of the Plan, the 50-foot wetland setback may be reduced to 10 feet.
2. Reduction of the front yard setback to 15 feet from the required 25-foot front yard setback.
3. The Applicant may clear 40% of the 5,459 square foot hammock area.

12. The Ocean Reef Community Association's ("ORCA") regulations require the Applicant to maintain a 28-foot front yard setback.

13. Due to the location of the wetland and hammock areas on the Lot, a substantial portion of the Revised Buildable Area is located within the ORCA-required 28-foot front yard setback.

14. According to the testimony of David Ritz, the ORCA Community Administrator, the Architectural Review Committee is responsible for reviewing all plans for conformance with the restrictions and building regulations at Ocean Reef. Mr. Ritz testified that when he learned about the County's proposed site plan showing approximately 2,300 square feet of buildable area, he polled the Architectural Review Committee and was informed they did not believe a variance was available. Mr. Ritz noted in a letter dated June 27, 2001, that nine of the most recent built homes in Ocean Reef had an average size of 4,333 square feet of enclosed space. Mr. Ritz did not believe that the County's proposal was acceptable to ORCA given the design standards of other homes and the community character of Ocean Reef.

15. Due to the vested rights of Ocean Reef and its unique circumstances as set forth in various County documents submitted at the hearing, the County has in the past consistently attempted to render determinations giving deference to the 1977 Master Plan.

16. The combination of the application of the applicable provisions of the Plan and Code, primarily the County's prohibition of any development in "red flag" wetlands, together with the application of the ORCA restrictions and of building regulations, primarily the setback requirements, make the Lot unbuildable.

CONCLUSIONS OF LAW

17. Policy 101.18.5, provides that neither the provisions of the Plan, nor the LDR'S shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of the Plan. This policy further provides that a property owner may apply for relief from the literal application of applicable land use regulations or of the Plan

when such application would have the effect of denying all economically reasonable use of that property unless such deprivation is shown to be necessary to prevent a nuisance or to protect the health, safety and welfare of its citizens under Florida Law. All reasonable economic use is defined as "the minimum use of the property necessary to avoid a taking within a reasonable period of time as established by current land use case law".

18. Section 9.5-173 of the Code implements the procedure contemplated by Policy 101.18.5 and provides that in order to establish an entitlement to Beneficial Use relief an Applicant must demonstrate that "the Comprehensive Plan and land development regulations" deprive the Applicant of all reasonable economic use of the Lot.

19. As is made clear by Policy 101.18.5, the standards applied to determine whether a regulatory taking has occurred are constitutionally based as set forth in current land use case law. This subject has been addressed by the U.S. Supreme Court in a number of cases, but there are two notable cases applicable to the facts presented here. Both cases involved landowners who claimed that they had been deprived by government regulation of all economically beneficial use of their property.

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 798 (1992), the property owner had purchased two ocean front lots to build single family homes. Two years later all development on the lots was prohibited by South Carolina's Beachfront Management Act. The Court confirmed the standard that when government regulations deny all economically beneficial or productive use of land, the property owner is entitled to compensation as a taking. In the Lucas case clearly all use was prohibited.

In Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed. 2d 592 (2001), the property owner had purchased approximately 20 acres of land for development. Many years later, but prior to development, regulations promulgated by the Rhode Island Coastal Resources Management Council designated salt marshes of the type on the Palazzolo property as protected coastal wetlands and significantly limited development. When his development project was turned down, the property owner sued alleging a taking under the Lucas standard. In that case, a portion of the land was still developable, which was ascertained to have \$200,000 of development value. While this was significantly less than the development value of the parcel as a whole, the Supreme Court upheld the Rhode Island Supreme Court's holding that all economically beneficial use was not deprived. Id at 630.

20. Applying the above standard to the facts presented herein of the Code, it has to be concluded that The Plan and LDRs in effect at the time the Applicant filed the subject Beneficial Use Application do not deny the Applicant all reasonable economic use of the Lot. Applicant could, without consideration of the ORCA restrictions, construct a residence of approximately 1,800 square feet. However, under Section 9.5-173(a)(2) and through this proceeding, Monroe County has agreed to partially grant the Applicant Beneficial Use relief as set forth in Paragraph 11 above, in order to provide additional reasonable use of the Lot.

21. The relief granted herein provides the Applicant a 2,300-2,500 square foot Revised

Buildable Area and said Area constitutes a reasonable economic use of the Lot.

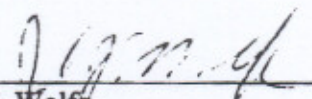
22. ORCA's deed restrictions and building regulations are reasonable and serve as legitimate private planning devices of the developers and owners of Ocean Reef property. However, while the Applicant may be prohibited by ORCA from building within the portion of the required 28-foot front yard setback otherwise permissible by Monroe County, that deprivation of use is not caused by the Plan or LDRs. Consequently, the restrictions imposed by ORCA cannot serve as a basis for Beneficial Use relief.

PROPOSED DETERMINATION

As stated above, under existing law, I have to conclude that the Applicant has not been denied all reasonable economic use of the Lot. However, with the combination of the Plan and Code provisions and the ORCA restrictions, the Lot will almost certainly be unbuildable. This result is due to the restrictive provisions of the Plan which prohibit all development in "red-flag" wetlands and which do not distinguish between isolated small wetlands surrounded by developed lots in a long planned and developed subdivision versus larger tracts of high quality "red flag" wetlands. This is a policy determination contained in the Plan and due to the fact that some, and more than a token, reasonable economic use of the Lot remains, it is beyond the scope of authority granted to a Beneficial Use Special Master to go beyond the confines contained therein.

Based upon the above Findings of Fact and Conclusions of Law, I recommend to the Board of County Commissioners that a final beneficial use determination be entered partially granting Applicants' beneficial use application in accordance with the relief set forth in Paragraph 11 above.

DONE AND ORDERED this 23rd day of May, 2002.



John J. Wolfe
Special Master